

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

SONOS, INC.

\* August 10, 2021

\*

VS.

\* CIVIL ACTION NO. W-20-CV-881

\*

GOOGLE LLC

\*

BEFORE THE HONORABLE ALAN D ALBRIGHT  
DISCOVERY HEARING (via Zoom)

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1 (August 10, 2021, 9:38 a.m.)

2 DEPUTY CLERK: Court calls Waco 6:20-CV-881, styled Sonos,  
3 Inc. versus Google LLC for a Markman hearing.

4 THE COURT: If I could have announcements from counsel,  
5 please.

6 MR. SIEGMUND: Good morning, Your Honor. This is Mark  
7 Siegmund for plaintiff Sonos, Inc. With me today is Cole  
8 Richter, Rory Shea, Dan Smith, Sean Sullivan, Michael Boyea and  
9 Jae Pak with the law firm of Lee Sullivan Shea & Smith LLP.

10 Mr. Richter, Shea, Smith and Boyea will be the main  
11 speakers today, Your Honor.

12 THE COURT: Okay.

13 MR. BURBANK: Good morning, Your Honor. Stephen Burbank  
14 with Scott Douglass & McConnico for Google. With me are  
15 co-counsel Charles Verhoeven, Jordan Jaffe and Marc Kaplan, all  
16 from Quinn Emanuel.

17 Also with us is our in-house counsel, Patrick Weston.  
18 Mr. Verhoeven, Mr. Jaffe and Mr. Kaplan will be handling the  
19 arguments for Google.

20 THE COURT: Well, it sounds like we have an all-star cast,  
21 and I appreciate in-house counsel and clients for attending. I  
22 also always enjoy having law clerks on competing sides. Always  
23 good to see former law clerks attend these hearings.

24 So let me pull up -- give me one second. The first claim  
25 term that we have is "multimedia."

1 Who will be taking this one up?

2 MR. RICHTER: I believe that will be me, Your Honor. Cole  
3 Richter on behalf of Sonos.

4 THE COURT: Yes, sir.

5 MR. RICHTER: And actually, you know, Your Honor, before  
6 we jump into some of the constructions, I was hoping to cover a  
7 couple of preliminary issues that apply to all the claim terms,  
8 if you'll permit me.

9 First, in reviewing some of the Markman transcripts from  
10 your other cases, Your Honor, we understand and we want to  
11 confirm on the record that our decision to argue certain things  
12 but not other things will not be held against us and that Sonos  
13 is preserving all the arguments made in the briefs and are not  
14 waiving any arguments on appeal regarding claim construction.

15 Did I get that right, Your Honor?

16 THE COURT: Well, let me just say this. I don't know what  
17 you mean by "be held against you." As far as I'm concerned,  
18 it's perfectly okay with me to -- for the parties to select  
19 which ones -- you've taken your position in all the papers, and  
20 I think those, on appeal, that -- but I'm not the Federal  
21 Circuit, and they wouldn't have ever let me appear in front of  
22 the Federal Circuit, but my sense is you all have those  
23 arguments.

24 What we do at the Markman hearing is, you all simply  
25 decide which ones you think are worthy of having additional

1 advocacy and have me decide.

2 But, for example, if there was a preliminary construction  
3 I gave with which your client disagreed with, as far as I'm  
4 concerned, the fact that you didn't argue it today doesn't  
5 mean -- doesn't mean it's not preserved. It just means you  
6 felt like it would be better -- the way I see it is, you  
7 thought your client would be better served by arguing other  
8 claim terms.

9 That's the way I see it. And I think that's -- you're  
10 absolutely right. I think that whatever you've argued in your  
11 papers, you've taken that position for purposes of appeal.

12 MR. RICHTER: Thank you, Your Honor.

13 Second, in the hopes of reducing some of the disputes  
14 before the Court today, I want to raise just a quick point of  
15 clarification on Your Honor's preliminary constructions.

16 So for the terms where, for example, Sonos proposed the  
17 construction and the Court, in its preliminary construction,  
18 said plain and ordinary meaning and those terms, for example,  
19 are "multimedia," "network interface," "playback device/zone  
20 player," "local area network," "data network," we understand --

21 THE COURT: All words that have plain and ordinary meaning  
22 that anyone would -- that anyone, even my 19 and 20-year-old  
23 would know. And I was going to get into that, but you go  
24 first, then I'm going to have some comments.

25 MR. RICHTER: Okay. No problem. No problem.

1           Yeah. I just wanted to seek this clarification.

2           So we understand that the Court's preliminary construction  
3 of plain and ordinary meaning is an indication that the Court  
4 believes that no construction is necessary at this time and  
5 that Sonos would not be precluded from asserting at a later  
6 time, for example, in a summary judgment motion or pretrial  
7 proceeding, that the plain and ordinary meaning of these terms  
8 as understood in the context of the patents-in-suit is the  
9 construction that Sonos is now proposing.

10          And if that understanding is correct, then Sonos will not  
11 present any argument at the hearing today against the Court's  
12 preliminary construction of plain and ordinary meaning for  
13 those terms and instead would reserve arguments.

14          THE COURT: You're absolutely right. But let me -- you're  
15 right, and I'm not -- but here's the way I see the world.  
16 My -- in none of these situations was I saying that the  
17 proposed construction was incorrect and rejecting it.

18          And typically -- not typically, always when I -- if I'm  
19 making that determination where someone has said, it's got to  
20 be X, and I think that that's not right, I put that on the  
21 record. That's not the situation here.

22          But here, let me frame it a little differently, and I was  
23 going to tell you all this anyway. The way I see the world,  
24 for better or worse for you all, is, when someone's drafting a  
25 patent and they use the word "zone," now, if the patent has to

1 do with zones and they are patenting something that has to do  
2 with zones and saying, my zone is different than an ordinary  
3 zone and here's why, and they claim something or they say  
4 something in the spec or they say something during the  
5 prosecution history to get the word "zone" allowed and they  
6 give up something, that's a different deal.

7 But in situations like this, where, you know, all the  
8 words, all the terms that you said, "multimedia," "network  
9 interface," "zone," "group configuration," especially "local  
10 area network," "data network," where when the person is writing  
11 the patent and he's just acting as one skilled in the art to  
12 interface with the Patent Office and he uses those claim terms,  
13 then it's plain and ordinary meaning and I don't swerve from  
14 that.

15 However, if for -- here's -- it's not a perfect analogy,  
16 but here's what I try and get across to people. Let's say that  
17 you have invented a way of -- a method of installing AstroTurf  
18 in a baseball field and the magic of the patent is that a  
19 baseball outfield is curved, and you come up with a method  
20 that -- part of which is on a field that is curved. And that's  
21 all you -- you used the word "curved," which everyone knows  
22 what the word "curved" means.

23 If someone comes in and wants to apply it to, let's say, a  
24 soccer field or a football field, the word "curved," that's not  
25 the plain and ordinary meaning. Those are 90-degree angles.

1 But if someone wants to come in and say, well, it's --  
2 there's only a 2 percent degree curve, that's not enough curve.  
3 That's not curved. To me, curved then has a plain and ordinary  
4 meaning.

5 And again, assuming nothing was given up and nothing was  
6 claimed and nothing in the specification, curved means curved.  
7 And when we get to the jury in this case and your person is  
8 saying that defendant's products have plain and ordinary  
9 meaning for "local area network," the only way either side is  
10 in trouble is if the expert takes such a greedy interpretation  
11 of local area network that I can decide as a matter of law that  
12 it either is or isn't a local area network.

13 And you can bring that to me after the final infringement  
14 contentions, you can bring it to me after the expert reports,  
15 or someone -- or you can come in and say, the other side's --  
16 the other side or their expert is not applying the ordinary  
17 meaning of this word.

18 Again, I use the word "curved" because I think a jury can  
19 understand, and as a factual matter, what is or is not curved.

20 But if you all have a fight, that's a true fight, over  
21 what the plain and ordinary meaning is of claim terms like  
22 "zone," then I want you to -- I want the parties to be in  
23 concrete on the positions they're -- legal positions they're  
24 taking with regard to infringement and invalidity, bring them  
25 to me -- motions -- I'm talking to you, but I'm talking to both

1 sides -- bring them to me as a preliminary summary judgment  
2 matter, and I will determine whether or not that's appropriate.

3 MR. RICHTER: Okay. Thank you very much for that, Your  
4 Honor.

5 And with that, Sonos can forego argument on many of the  
6 terms. Actually, the terms that were given the plain and  
7 ordinary indication in the Court's e-mail. And Sonos would  
8 then instead argue the two terms that had a preliminary  
9 construction of indefinite, and that would be "cause a  
10 selectable indication" -- sorry. Go ahead, Your Honor.

11 THE COURT: Let me just interrupt you for a second. I'll  
12 ask Mr. Burbank or Mr. Verhoeven, or whoever it is: Having  
13 heard what counsel just said, does the defendant wish, on any  
14 of the claim terms -- we're going to get to the ones about  
15 whether or not it's indefinite, but with regard to the claim  
16 terms that Sonos is not going to take up with respect to plain  
17 and ordinary meaning, does the defendant have any desire to be  
18 heard on any of those claim terms? If not, we'll move forward  
19 to the ones that -- where the argument is that they're  
20 indefinite.

21 MR. VERHOEVEN: Well, Your Honor, this is Mr. Verhoeven.  
22 Let's just take an example of the phrase "network interface."  
23 Your Honor construed that to have its plain and ordinary  
24 meaning.

25 We have a dispute right now because the plaintiff in this

1 case, Sonos, wants to limit network interface to only digital  
2 networks and not all networks. And we've said that we disagree  
3 with that construction and the plain and ordinary meaning  
4 should apply, which is all networks, digital or analog.

5 Your Honor said plain and ordinary meaning in the  
6 construction. So here's an example of one where we know we  
7 disagree with what they're proposing.

8 THE COURT: Well, you actually have -- you've actually  
9 made my point. Right now I have -- right now I've said it's  
10 plain and ordinary meaning. If when you get their final  
11 infringement contentions or when you get -- when you get --  
12 when they are in concrete -- when either they have taken a  
13 position on infringement contentions or in their expert report  
14 where they attempt to limit it in the manner that you say, you  
15 are free to file a motion for summary judgment and say to me,  
16 Judge, that's not -- they are not applying the plain and  
17 ordinary meaning as a matter of law, and I will take that up  
18 and I will decide it.

19 MR. VERHOEVEN: Okay. Well, with that, that's great, Your  
20 Honor. And it's good to know. I appreciate your telling us  
21 that in the beginning.

22 THE COURT: Because right now your concern is -- I've had  
23 a couple Markmans now. And by the way --

24 (Laughter.)

25 THE COURT: By the way, it's wonderful. I haven't seen

1 you, I don't think, since we were standing in Judge Sparks'  
2 courtroom a very long time ago.

3 But here's the problem I have -- I encounter a lot. You  
4 come in here -- not you you. But a party comes in here and  
5 says, we know from their preliminary infringement contentions  
6 they're going to say this. That doesn't matter either to me at  
7 this point. They're preliminary.

8 And also, I choose to remain ignorant with regard to a  
9 position they're taking about whether or not it's plain and  
10 ordinary meaning.

11 Now, once you have their final contentions and once you  
12 have an expert saying you guys infringe -- Google infringes, it  
13 has X term, and you can come in and say, as a matter of law,  
14 they're wrong, that's not the plain and ordinary meaning of  
15 this term, now you're stuck and they're stuck.

16 And then I'm actually going to look at the -- at what  
17 their expert says. But again, my only wiggle room here is,  
18 again, on a word, for example, like "circular," where I think a  
19 jury could determine whether or not the plain and ordinary  
20 meaning is a very slight curvature of the fence or if it has to  
21 be an ice cream cone-looking thing, I think a jury can handle  
22 that because I think it's a pretty normal word.

23 But on something where you think -- not you you. But  
24 where a party thinks that if they take this position on  
25 infringement as a matter of law that cannot be the plain and

1 ordinary meaning, you're welcome to file a motion for summary  
2 judgment.

3 And let me add this to it for the lawyers. We have a few  
4 things going on here. If you file something like that, just --  
5 it doesn't offend me at all. In fact, I encourage it. Let us  
6 know that you have filed something that is kind of a gating  
7 issue like that, that needs to be resolved sooner rather than  
8 later, and ask for a hearing and -- as quickly as it's briefed,  
9 and we can take it up -- I'll take it up, because I want -- I  
10 don't want you all to get to trial and say, Judge, you know, we  
11 filed this motion eight months ago and we're here at trial.

12 I mean, if you think you've got a -- either side has a  
13 motion for summary judgment that something is not plain and  
14 ordinary meaning, then bring it and I will take that up in  
15 advance. And the jury -- if I think that's right, the jury's  
16 not going to take that up.

17 MR. VERHOEVEN: Thank you very much, Your Honor. That's  
18 very helpful.

19 THE COURT: I mean, I don't know if any other judge does  
20 it that way. But I've found that that's the best way, with the  
21 cases I'm dealing with, to do it.

22 So if there's a better way, you all are free to tell me.  
23 But so far, this has worked pretty well for me.

24 And by the way, I mean, I have -- you know, it gets no  
25 press, and maybe it shouldn't, but I don't think I've had a

1 trial yet, a patent trial, go where I haven't granted either a  
2 summary judgment or a Daubert on something.

3 So, I mean, I take -- I'm just saying, I take these  
4 motions very seriously. You're not going to get here and I'm  
5 going to say, oh, they take too long to do, just go to trial.

6 I think it's very important, the way I do things at this  
7 stage, to actually rule if you all bring me a motion that is as  
8 a matter of law. But just let us know when it's filed so we  
9 can get it taken up in due course.

10 MR. VERHOEVEN: Thank you very much, Your Honor. That's  
11 really helpful information.

12 THE COURT: So now that -- so having heard that, is there  
13 anything specifically on any of the claim terms that are plain  
14 and ordinary meaning that you'd like to take up before we  
15 move -- and you're welcome to -- before we move to the issues  
16 of indefiniteness at least with "zone configuration" and "group  
17 configuration" and also "causing a selectable indication"?

18 MR. VERHOEVEN: So, Your Honor, the one term that comes to  
19 mind for me is "zone scene," which Your Honor did provide a  
20 construction for.

21 THE COURT: Okay.

22 MR. VERHOEVEN: So we would want to argue that one.

23 THE COURT: Let me -- so if you think that you have an  
24 argument and the other side doesn't, you can go ahead and go  
25 now.

1 Well, I'll just do that anyway. You can go ahead and  
2 let's take up "zone scene," which is s-c-e-n-e, for the court  
3 reporter. And you take it up, and then I'll hear from  
4 plaintiff's counsel after you finish.

5 But if you'll give me just two seconds, I'm out-of-pocket  
6 here, I need to grab a pen real quick. I'll be right back.

7 MR. VERHOEVEN: Sure. And can we get the slides up while  
8 His Honor's doing that?

9 THE COURT: I'm ready when you are, sir.

10 MR. VERHOEVEN: Thank you, Your Honor.

11 THE COURT: Can you all see me still?

12 (Clarification by the reporter.)

13 (Off-the-record discussion.)

14 MR. VERHOEVEN: Your Honor, this is Mr. Verhoeven. So is  
15 it correct that you cannot see the slides?

16 THE COURT: I can see the slides.

17 MR. VERHOEVEN: Oh, you can see the slides.

18 THE COURT: Yes, sir. I can.

19 MR. VERHOEVEN: Then may I go ahead and proceed?

20 THE COURT: Yes, sir. Absolutely.

21 MR. VERHOEVEN: Can we go to Slide 6, please?

22 So this "zone scene" I want to argue, Your Honor. So I'm  
23 putting up just an illustration of a zone first. Your Honor  
24 said the phrase "zone" doesn't need to be construed, it should  
25 be given its plain and ordinary meaning.

1           And here's just an illustration of a zone. We all know,  
2           it's an area. It's a zone where you have these speakers.  
3           That's not what the invention is in these three patents in this  
4           case. That's in the prior art. So this patent doesn't claim  
5           to have invented zones for the purpose of listening to music  
6           that was already in the art.

7           So let's go to zone scene, Slide 9, please.

8           So here, Your Honor, is the competing constructions, at  
9           least as initially set out in the process where we had the  
10          disclosure of constructions. And Google felt that a  
11          construction was necessary, Sonos initially said a construction  
12          is not necessary.

13          The reason we propose a construction, Your Honor, is  
14          because we need to give -- this patent adds as an innovation,  
15          as the claimed innovation, the notion of a zone scene being  
16          something different from a zone.

17          And the dispute here, Your Honor, is: Does a zone scene  
18          require something more than just a zone; and if so, what?

19          And our argument is a zone scene, they've added the word  
20          "scene," and that has to be given meaning. And if you look  
21          through the intrinsic evidence, it's very clear that the  
22          patentee meant scene to mean the same thing as a theme, a scene  
23          or a theme.

24          And maybe we just go with plain and ordinary meaning, Your  
25          Honor, but it has to be a scene or a theme. If you read that

1 out of the phrase "zone scene," then, in our view, that's error  
2 because scene is not given any meaning. It's just the same as  
3 zone. So that's the dispute here.

4 If you go to the next slide, please.

5 Now, importantly, the parties agree that zone scene is a  
6 coined term, which means we don't -- we have to look at the  
7 specification, and the specification is what's going to tell us  
8 what does zone scene mean with a coined term?

9 It's not just plain and ordinary meaning -- you look at  
10 the specification -- because they've made it up. They've made  
11 up a term. In this case, they've made up a term called "zone  
12 scene," and we have to look to the spec to see what it means.

13 Next slide.

14 Could we go to the next slide, please?

15 So here, Your Honor, I just want to underline the  
16 importance of this. This is the abstract for the '206 patent,  
17 which is the earliest patent they're asserting in this group.  
18 And here you see the discussion of -- in the abstract of what  
19 the invention is is essentially this thing, this theme or  
20 scene.

21 So it says: According to -- according to one aspect of  
22 the present invention, a mechanism is allowed -- is provided to  
23 allow a user to group some of the players according to a theme  
24 or scene, wherein each of the players is located in a zone.

25 So you have multiple zones that are grouped into a single

1 theme or scene, then it continues: When the scene is  
2 activated, the players in the scene react in a synchronized  
3 manner.

4 And it goes on to talk about how the scene works. So this  
5 word "scene" that's been coined and added to the claims here is  
6 the heart of what they're saying is new and unique in this  
7 patent. And in our view the proposed construction that --  
8 well, let's continue.

9 Next slide.

10 The specification provides an example of what a zone scene  
11 is. And so here -- this is Slide 13, Column -- the '206  
12 patent, Column 9, Lines 36 through 41: For example, a  
13 "Morning" scene includes three zones, each in a bedroom, a den  
14 and a dining room. After selecting the scene, the user may set  
15 up an alarm for the scene as a whole.

16 So here --

17 THE COURT: Mr. Verhoeven, let me ask you this: If -- you  
18 know, number one, it's kind of cautioned, as every good writer  
19 would do, by saying "according to one embodiment," and I'm sure  
20 I'll hear from the plaintiff in a second.

21 But if this is the way the specification -- what the  
22 specification says about it, why do I need to add that to the  
23 claim construction?

24 MR. VERHOEVEN: Well, in your tentative, Your Honor,  
25 the -- in your tentative, you've adopted the plaintiff's

1 proposed construction, which I'm going to get to -- I can go  
2 right there right now, if you would like, Your Honor -- and in  
3 our view that does not require a scene or a theme. It's the  
4 same thing as a definition of a zone.

5 And so we think that, at a minimum, it should just be  
6 plain and ordinary meaning of what a scene or theme is. But we  
7 can't have a construction that reads out that there has to be a  
8 scene or a theme and the word "zone scene" because that's what  
9 the innovation is in this patent.

10 And if we construe it -- could we go to the slide -- just  
11 one second, Your Honor. Let's go to Slide 14.

12 So actually, Your Honor, in the lead up to this Markman,  
13 Sonos told us that they didn't want a construction and no  
14 construction was necessary for zone scene. This is just an  
15 excerpt of the chart that was provided.

16 But in their brief for the first time --

17 Go to the next slide.

18 -- they provided a definition. And this is an excerpt  
19 from their brief -- I'm on Slide 15, Your Honor -- Sonos' reply  
20 brief at Page 12. This is the first time they provided a  
21 proposed construction in the reply brief.

22 And as you see in the proposed construction, there is no  
23 definition or construction of what a scene is. And so what  
24 they proposed is a previously-saved group of zone players.  
25 Okay. Well, that's a zone. A previously-saved group of zone

1 players that are configured for synchronous playback of the  
2 media when the zone scene is invoked. But there's no  
3 construction of what a zone scene actually is in this proposed  
4 definition, Your Honor. It's just recursive.

5 And so --

6 THE COURT: Which slide are you on?

7 MR. VERHOEVEN: I'm on Slide 15, Your Honor.

8 THE COURT: Okay.

9 MR. VERHOEVEN: And if you look at --

10 THE COURT: This --

11 MR. VERHOEVEN: This is just an excerpt.

12 THE COURT: No. I got this. I'm going to ask the  
13 plaintiff to put a pin in this one and I'll ask -- I mean, it's  
14 pretty obvious the point you're making, and I get it, but it  
15 seems to me this is probably at the heart of what you're  
16 arguing here.

17 So whenever it is you're -- in fact, then let me go ahead  
18 and hear from plaintiff's counsel why it is that saying "for  
19 synchronous playback of media when the zone scene is invoked"  
20 is sufficient articulation of what a zone scene is.

21 MR. SHEA: Yes, Your Honor. Rory Shea on behalf of Sonos  
22 to address this issue. And good to see you again, Your Honor.

23 THE COURT: Good to see you, my friend.

24 MR. SHEA: It's been a little while.

25 Yes. So zone scene. What -- I think there's been a

1 couple things here, Your Honor, that have been a little  
2 misleading.

3 First of all, let me address the point that's on the  
4 screen first, then I can circle back to a couple things. But  
5 the critical thing here about a zone scene is that it is a  
6 previously-saved group of players that will be configured for  
7 synchronous playback when invoked. That's the key here, Your  
8 Honor.

9 And if you look at the specification and you look at the  
10 background leading into this technology, this makes total  
11 sense. Sonos' original grouping technology -- for starters,  
12 it's a foundational aspect of Sonos' system to have the ability  
13 to group zone players together for synchronous playback.  
14 That's one of the foundational things. It's been in -- it was  
15 originally disclosed in patents as early as 2004. It's been in  
16 Sonos' commercial product since 2005.

17 The original mechanism, the original way that groups were  
18 formed was in a more ad hoc manner. So what you had to do --  
19 and, Your Honor, I don't know if you've ever used this Sonos  
20 system, but the way you generally group players is, you go --  
21 at the time you decide you want to hear synchronous playback in  
22 multiple -- on multiple players, you go in on a one-by-one  
23 basis, you say, I want to hear it on this player and this  
24 player and this player. And it's something I do at my house,  
25 for instance, often.

1           What the invention of this patent is, is it realized --  
2 the inventors recognized that having to go through that process  
3 every time you want to hear synchronous playback in a given set  
4 of players can start to get a little cumbersome if you're often  
5 using the same group.

6           So to give an example, let's say that every evening I like  
7 to listen to my three players that are in my upstairs level.  
8 But then during the daytime, I break those apart, maybe I  
9 listen to something else in a different place in my home. And  
10 then I want to go back and listen to those same three players  
11 in my upstairs level again the next night.

12           What this invention realized is, okay, in order to make  
13 that process more efficient, what we can do is we can allow a  
14 user to previously save a predefined grouping -- and that's the  
15 phrase right out of the specification, "predefined grouping" --  
16 of players that can then later be invoked when the user wants  
17 to hear audio synchronously in that group.

18           And prior to that time, prior to invocation of that group,  
19 what the specification teaches is that those players would not  
20 be grouped together. They would be individual, in which case  
21 you could listen to one piece of media on one player and  
22 another piece of media on another player.

23           But when you were to a point where you wanted to listen to  
24 audio synchronously across those multiple players, you would  
25 then be able to invoke this previously-saved group, which could

1 be as simple as a single selection by a user. You pick the  
2 previously-saved group, you select it. And in one selection,  
3 as an example, it would then kick off the grouping process as  
4 opposed to having to go and select each individual player you  
5 want to put into that group.

6 That is what a zone scene is, and that's what the  
7 specification teaches. It's taught both in the non-provisional  
8 disclosure as well as the provisional disclosure, which you'll  
9 notice, defendant does not provide any analysis or address at  
10 all in their briefing.

11 But that is what a zone scene is, and that's what our  
12 construction here is saying, is that unlike a group that's  
13 created in an ad hoc manner, what a zone scene is is it's a  
14 previously saved so that when it's later invoked the players  
15 will be configured for synchronous playback. And that's what  
16 the construction says here.

17 Now, the use of the term "zone scene" in this was just by  
18 nature of the fact that what causes the invocation is a later  
19 selection of that zone scene. But you could -- in theory, you  
20 could use a different term there if there was any sort of  
21 concern with recursiveness.

22 You could, for instance, say that it's -- it's a  
23 previously-saved group that are configured for synchronous  
24 playback of media when that grouping is invoked, if there's  
25 some concern. Although, I do think that saying that it's a

1 grouping that will be configured for synchronous playback when  
2 the zone scene is invoked is probably the most precise and  
3 accurate way to say it in view of the specification, Your  
4 Honor, but that is why that term appears within the  
5 construction.

6 MR. VERHOEVEN: Your Honor, may I respond briefly?

7 THE COURT: No. No. I'm kidding.

8 (Laughter.)

9 THE COURT: But if you all would be kind enough --

10 MR. VERHOEVEN: You're on the screen now, Your Honor.  
11 Just giving you some warning.

12 THE COURT: -- to give me -- if you'll give me just a  
13 minute or two, my computer's working, I'm told, and I'm going  
14 to switch back to my computer, which is a little better.

15 But while I'm doing that, if you'll both be thinking --  
16 I'm thinking of editing my preliminary construction. If you  
17 guys want to write it down to being this. And then,  
18 Mr. Verhoeven, you can start. But this is -- I know  
19 occasionally lawyers or clients must be wondering what I'm  
20 doing here, am I listening to you guys. I'm usually doing what  
21 I was doing here, which is communicating with my law clerk, and  
22 I had addressed an issue I had with an -- on our preliminary  
23 construction.

24 This is the -- this is going to be the more likely  
25 construction: A previously-saved group of zone players

1 according to a common theme.

2 Let me say that again: A previously-saved group of zone  
3 players according to a common theme.

4 If you all will give me just a minute or two, I'm going to  
5 try and get on my computer. I'll be right back with you guys.

6 (Pause in proceedings.)

7 THE COURT: Can you all see me now?

8 MR. VERHOEVEN: Yes, Your Honor.

9 THE COURT: Okay. Very good. And I have Slide 15 back  
10 up.

11 Mr. Verhoeven, the floor is yours.

12 MR. VERHOEVEN: Thank you, Your Honor.

13 The proposed construction that you read before switching  
14 to your computer is acceptable to my client, Your Honor. I  
15 just -- but just to underline the point -- and I hate to speak  
16 after you've given me what I'm asking for, but just because I  
17 know the other side's going to say something.

18 Can we go to Slide 17?

19 I just wanted to illustrate, Your Honor, because what  
20 they've -- on the left here is their construction, what they're  
21 proposing. On the right is the picture of the zone without a  
22 zone scene that we looked at.

23 Now, if you read their construction, it reads on zone  
24 without even a zone scene. So zone is a previously-saved group  
25 of zone players. Okay. And so without a theme, just saying

1 it's previously saved is reading out the way -- the word scene  
2 or theme. And with that, I'll sit down.

3 THE COURT: Any -- woops.

4 Anything else from plaintiff's counsel with regard to the  
5 Court's proposed construction?

6 MR. SHEA: Yes, Your Honor. A couple points.

7 First of all, again, I just want to -- I want to just  
8 address this last point that Mr. Verhoeven made because I just  
9 don't think it's accurate or correct.

10 There is a critical distinction there in the portion of  
11 the construction, our original proposed construction, that  
12 defendant is not highlighting or giving credence to, which is  
13 this concept of "when invoked."

14 The big difference between a zone scene and a zone is a  
15 zone is effectively just a logical way to identify players in a  
16 multiplayer system. That's what a zone is.

17 A zone scene is the concept that you have a predefined  
18 previously-saved group that can live in an uninvoked state as  
19 well as an invoked state.

20 And so I think that that is a key distinction between that  
21 and a zone.

22 Now, the other thing, Your Honor, I want to address. And  
23 if you don't mind, I'm going to pull up my slide deck.

24 THE COURT: What I'm not following is whether or not you  
25 agree with what I just proposed or not, because it seems I've

1 taken into consideration what you just said, which is it has to  
2 be a previously-saved group of zone players.

3 MR. SHEA: Yes, Your Honor. And I agree, and the  
4 previously-saved group part, certainly we are in agreement  
5 with.

6 The common theme raises a couple concerns that I wanted to  
7 address from our perspective, Your Honor. One thing that we  
8 have a concern about is that we believe that common theme can  
9 introduce and may introduce ambiguity into this construction in  
10 terms of what that phrase and that term means. And so just a  
11 little history about the term "theme" in the context of these  
12 patents.

13 First of all, the phrase "common theme" is actually not a  
14 phrase that you see anywhere in the intrinsic evidence at all.  
15 The only term that is in there is "theme." And one of the  
16 things to be aware of is, theme is actually a word that was  
17 never used one time in the provisional application that serves  
18 as the priority application here at all. So theme was a word  
19 that was added afterwards in the non-provisional application.

20 If we look at what the provisional says about what a zone  
21 scene is, it does not use the word "theme" at all. And what it  
22 talks about is that it's -- again, it's a previously-saved  
23 group that allows you to pre-create this group so that it can  
24 be invoked later.

25 And just a couple of samplings of things, Your Honor. I'm

1 looking at Slide 50 of our PowerPoint here, which is one of the  
2 excerpts from the provisional application.

3 You can see here that it talks about the zone scene  
4 feature allowing the user to arrange zones into groups using a  
5 single command, and it contrasts that with linking zones one at  
6 a time, which is that concept I touched on earlier.

7 Moving to the next slide. This is Slide 51 of our  
8 presentation.

9 That -- this is another excerpt from that same page of the  
10 provisional, and you'll see that it says that "the simple scene  
11 allows a user to set up a single zone group per scene."

12 It talks about a "morning scene," which would group three  
13 different sets of zone players together but would leave all  
14 other zones in the household untouched.

15 THE COURT: Well, let me interrupt you here and ask you  
16 this: I mean, here's the problem, because it --  
17 Mr. Verhoeven's right, this is a coined phrase, which is  
18 certainly acceptable. But if we don't have something to tether  
19 how the previously-saved group was put together, then how does  
20 anyone know what a zone -- what -- I get that it is a  
21 previously-saved group of zone players. I get that last night  
22 I went and listened to, you know, a grouping that I wanted to  
23 have saved.

24 But for the claim term to mean anything, a "zone scene" to  
25 mean anything, that's without -- what would you propose instead

1 of what we have here, which is "to a common theme"?

2 What you had in your proposal that we went with on the  
3 preliminary was just kicking the can down the road a little bit  
4 by saying "when the zone scene is invoked."

5 What -- how is the previously-saved group of zone players  
6 done to form a zone scene?

7 MR. SHEA: Well, Your Honor, what I think we -- with the  
8 zone scene, the -- what it really is is it's -- it is a  
9 previously-saved group, but it's -- that previously-saved group  
10 is defined in that it is -- it enables players to be become  
11 configured for synchronous playback when it is later invoked.

12 So the characteristic of it is that it's -- not only is it  
13 previously saved, but it's previously saved in a way that  
14 allows it to exist in an uninvoked state and then to be later  
15 activated or invoked in order to then put these players into a  
16 configuration in which they would play back in synchrony.

17 And exactly, you know, what -- how it is that the players  
18 are grouped together, I think the specification would teach  
19 that. In fact, the provisional walks through various different  
20 mechanisms you can use to actually put the players into that  
21 saved group.

22 But the key is that once you've created that saved group,  
23 it's a thing that exists in this dormant state until it gets  
24 invoked, at which time it then triggers the players to become  
25 configured for synchronous playback. And so that really is

1 what the zone scene is described.

2 So in our view, you know, when we talk about a common  
3 theme, really it's -- the theme here -- I think, in some ways,  
4 we're looking at it in a more specific way. The theme here is  
5 that the players are to be grouped for synchronous playback  
6 when they are ultimately invoked.

7 THE COURT: Is there anything else you wanted to add  
8 before I turn to Mr. Verhoeven?

9 MR. SHEA: I think I can pause at that point, Your Honor.  
10 You know, depending on what Mr. Verhoeven says, I may reserve  
11 the right to respond, if you'll allow me.

12 THE COURT: You guys, no one enjoys listening to good  
13 lawyers more than I do. This has been a delightful morning.  
14 So just -- I'll hear from Mr. Verhoeven, then, Mr. Shea, you  
15 can say anything you care to.

16 MR. VERHOEVEN: I'll merely add, Your Honor, that if you  
17 look at this provisional, it says, for example, morning scene.  
18 That's exactly what's in the specification that I showed you,  
19 what I was reading: For example, a "Morning" scene includes  
20 three zone players, each in a bedroom, den and dining room.

21 This is showing the exact same thing, and it's giving it a  
22 theme. It's called "morning scene." So --

23 THE COURT: Well, Mr. Verhoeven, let me ask you this --  
24 and, you know, back when we met 15 years ago, I don't know  
25 whether I would've had the courage to ask someone of your

1 caliber or Mr. Shea this question, but I get to now, I guess  
2 because I have this job.

3 But it seems to me what you're trying to do -- and I  
4 understand why -- is limit the construction of the claim to  
5 include that which is in the specification here.

6 That being said, if the -- again, if the plaintiff takes a  
7 position that Google infringes and that they have a zone scene  
8 and they don't -- and Google doesn't do what's supported in the  
9 specification, then why wouldn't you have a good  
10 noninfringement claim that is divorced from what the Markman  
11 construction is of zone scene?

12 MR. VERHOEVEN: Your Honor, the issue is, the way that the  
13 other side is proposing to construe this, it takes out the  
14 notion of a scene or theme out of the construction and merely  
15 requires it to be a predefined grouping.

16 I'm not sure I understand all this business about invoking  
17 it in the future and saving. It's -- what we're talking about  
18 is what the patent says. It says "zone scene," and the  
19 specification -- the abstract says the -- which we covered,  
20 says: The invention is grouping it according to a scene or a  
21 theme.

22 So we've proposed a common theme because that's what the  
23 specification says is an alternative way of describing scene.  
24 And the theme would be, for example, grouping three areas as a  
25 morning scene or a morning theme because you get up in the

1 morning and these are the three areas you want to have music  
2 in.

3 You could do the same thing -- and the patent provides  
4 examples -- for other types of zone scenes for different times  
5 of day or different types of events, Your Honor.

6 That's what they have alleged, the patentee has alleged,  
7 is the innovation over just grouping zones.

8 THE COURT: Can you -- could one of you, either of you,  
9 pull up the claim itself so I can see the use of the words  
10 "zone scene" in the context of the claim?

11 MR. VERHOEVEN: Sure.

12 MR. SHEA: Yes, Your Honor. Let me -- so, Your Honor,  
13 here is a -- an example. This is one of -- oh, sorry about  
14 that. This is one of the three patents that the term appears.

15 THE COURT: Okay. Just give me a second to review this.

16 Mr. Verhoeven, I interrupted you, I'm sorry, to ask that.  
17 You can say whatever else you want, and then I'll switch back  
18 to Mr. Shea.

19 MR. VERHOEVEN: Sure. So the point I'm making, Your  
20 Honor --

21 Switch back to our slides real briefly. It's Slide 16.

22 On the left here, Your Honor, this is Slide 16. It's just  
23 an illustration. This is what the patent says is new and  
24 unique, that you can group zones, two or three zones together,  
25 according to a theme.

1 Now, if you take out the theme, the morning, and all you  
2 say is it's a predefined grouping, then you've just got the  
3 thing on the right, which is simply a zone. And the zone is  
4 not new or unique.

5 And, you know, we can go into the reasons why we're making  
6 certain arguments, if you want. I mean, Google doesn't do  
7 themes like this, but that's not really appropriate for claim  
8 construction. We're just looking at the intrinsic evidence.

9 In the intrinsic evidence it's very clear that this is the  
10 big thing they're saying is new or unique, that they've created  
11 this idea of having a scene or theme. And they give examples  
12 of a morning one, and they talk about grouping more than one  
13 zones (sic) together according to the theme. And that's  
14 exactly what Your Honor, in your latest proposed construction,  
15 has encompassed.

16 So we think you should go with what you proposed in your  
17 latest proposal, Your Honor. Otherwise, if you're just talking  
18 about a predefined grouping that can be invoked, you're just  
19 talking about zones. You're not talking about putting zones  
20 together in a theme.

21 THE COURT: Mr. Shea?

22 MR. SHEA: Yes, Your Honor.

23 So again, I have to address this because it's just -- it's  
24 absolutely just incorrect and, I think, intentionally  
25 misleading about the difference between these things.

1       A zone is a fixed, static thing, and that's what it's  
2 described as. So to the extent that there could be -- in most  
3 cases, a zone is a single player. There are some examples  
4 where a zone -- what Mr. Verhoeven is referring to as a zone  
5 could refer to multiple players. But in that case, that is a  
6 fixed concept, and it's a way to logically identify players in  
7 the system.

8       This concept of previously saving to then later be  
9 invoked, zone has nothing do with that, Your Honor. A zone is  
10 always invoked. It is fixed. It is constant. Once you form a  
11 zone, that zone is not -- is active perpetually.

12       The zone scene, the critical thing here is that that's not  
13 what a zone scene is and, from a user functionality standpoint,  
14 is a critical distinction. Because with a zone, once you put a  
15 player into a zone, it's fixed. You can't play individually on  
16 that player. It is now part of this static, fixed concept of a  
17 zone.

18       A zone scene, you add a player to a zone scene unless and  
19 until you invoke that zone scene in order to bring those  
20 players together for synchronous playback, you continue to have  
21 the ability to individually play on that player.

22       So if I could give you an example, let's say I have a  
23 player in my kitchen and a player in my bathroom. I can put  
24 those two players in a zone scene -- and this is shown in our  
25 tutorial as well, Your Honor. But I can put those two players

1 into a zone scene, kitchen and bathroom, and then name it  
2 something.

3 And whether I name it "morning" or -- "downstairs" is a  
4 very common name I use in my zone scenes, but whatever name I  
5 give it so that I remember what it is later, I've created that  
6 zone scene. But I can continue to play individually just in my  
7 kitchen, continue to play individually just in my bathroom.  
8 And only when I desire to put those things together, link them  
9 and play synchronously across both of them, do I then actually  
10 take the step of invoking and using this scene.

11 And so that is a critical distinction. That is what a  
12 zone scene is, Your Honor.

13 A couple other things I want to address. I mean, there's  
14 a lot of focus being placed on this notion of the zone scene  
15 having a morning name or an afternoon name or whatever it is.  
16 To be clear, these are just user-entered names for a zone  
17 scene. And the spec tells us that, right?

18 It says here, right here that, for instance, the  
19 Figure 3A, it says -- shows the effects of grouping the zones  
20 to make a group of three zones named after "morning."

21 So yeah. You can give it a name like morning, but you can  
22 name a zone scene whatever you'd like. You know, really at the  
23 end of the day, whether it's morning or whatnot, it's a way for  
24 the user to create some sort of association, predefined  
25 grouping of those players, and give it a name that you can then

1 use later to invoke it.

2 So if -- I struggle a little bit with the word "common  
3 theme" for a couple of reasons, Your Honor.

4 One, this term "common" in front of "theme," that's  
5 something that -- the term "common" doesn't appear in the  
6 specification even where it does use "theme." So we have some  
7 concerns about that creating some additional ambiguity.

8 Secondly, the word "theme" in the specification is used  
9 directly as a synonym for a zone scene. I mean, what the  
10 specification tells us is that a -- they repeatedly use those  
11 as alternatives in a way that says that -- that's all a theme  
12 is. It's just a different shorthand word for a zone scene.

13 So defining zone scene to include the phrase "common  
14 theme" I think presents a concern of -- it's just -- it's as  
15 circular, if not more, than what we have proposed. And it then  
16 interjects this confusion, and I think Mr. Verhoeven kind of  
17 highlighted it for you, Your Honor.

18 I mean, what defendants plan to do is to ask for this  
19 common theme construction and then turn around and use that and  
20 read in limitations into that phrase to try to distinguish  
21 technology that otherwise is exactly what these zone scenes are  
22 that are described in the specification.

23 THE COURT: Mr. Verhoeven?

24 MR. SHEA: So -- sorry, Your Honor.

25 THE COURT: I'm sorry. Were you done, Mr. Shea?

1           MR. SHEA: Yeah. I didn't know if you were going to have  
2 any comments.

3           I mean, the last thing, you know, maybe, Your Honor, just  
4 before I pass things back, what I wanted to do is just --  
5 sorry. Let me go to here.

6           To just underpin my point about the theme, these are both  
7 examples right from the specification where you can see it says  
8 "using what is referred to as a theme or a zone scene." Excuse  
9 me. And then here again, you say, "Providing a player theme or  
10 a zone scene."

11           So these -- my apologies. Hold on one second, Your Honor.  
12 I was informed that I wasn't showing that.

13           But these two paths, just from the specification, which  
14 are shown on Slide 56 of our presentation, show that really a  
15 theme is just -- it's just a different term for a zone scene.  
16 It's not a requirement or a limitation of what a zone scene is.

17           What that is is this previously-saved group of players for  
18 later invocation in order to enable them to play back in  
19 synchrony.

20           So I guess, Your Honor, maybe my final point was, if by  
21 common theme, if what that term means is that there's some name  
22 assigned to this previously-saved predefined grouping of  
23 players that allows them to be called up and invoked later, if  
24 that's what common theme means, I think that's certainly  
25 something that we would be amenable to.

1 But if common theme is intended to mean something more or  
2 something that -- I don't quite know what it means if it's not  
3 a name, then we do believe that that presents more ambiguity  
4 than anything else.

5 THE COURT: Well, right now what I have is: A  
6 previously-saved group of zone players according to a common  
7 theme.

8 That's what the construction is and sounds to me like  
9 you're okay with that.

10 MR. SHEA: Yeah. With the caveat that as long as the  
11 common theme in that context refers to having some name that's  
12 assigned to that grouping of players, then we are amenable to  
13 that construction.

14 THE COURT: Well, you're going to have a construction,  
15 Mr. Verhoeven's going to have a construction, and you can have  
16 your people determine, based on that construction, whether or  
17 not you think there's infringement or not, and he can say there  
18 is or isn't.

19 So is there anything else you wanted to add?

20 MR. SHEA: No, Your Honor.

21 THE COURT: Mr. Verhoeven?

22 MR. VERHOEVEN: Nothing more, Your Honor.

23 THE COURT: I'll be back in a few seconds.

24 (Pause in proceedings.)

25 THE COURT: Okay. We're going back on the record.

1           The construction for that claim term is going to be: A  
2 previously-saved group of zone players according to a common  
3 theme.

4           Since I have jumped around here a bit, Mr. Verhoeven, you  
5 happen to be on screen, so I'll start with you. Other than the  
6 indefinite -- the claim terms where there are issues and  
7 arguments over whether or not they're indefinite, are there any  
8 other claim terms that we need to take up, just so I don't  
9 accidentally miss any of them?

10          MR. VERHOEVEN: No. I'm arguing, Your Honor, the "zone"  
11 terms. And the answer to the zone -- on the "zone" term claims  
12 is no. There aren't any others.

13          There's two indefiniteness claims that are related to  
14 zones, one of which, I assume, the other side would like to  
15 argue, but I'm not sure.

16          THE COURT: Right.

17          MR. VERHOEVEN: One of which we would like to argue.

18          THE COURT: Okay. So which one did you want to argue? We  
19 can take that one up first, and then --

20          MR. VERHOEVEN: Sure.

21          THE COURT: Then we'll take up "causing the selectable  
22 indication" second.

23          So which one did you want?

24          MR. VERHOEVEN: So there's -- this gets a little  
25 confusing, Your Honor. There's competing -- unfortunately, we

1 were unable to agree on how to separate out the terms for  
2 construction. So you see -- if you could look at our -- I  
3 think it's simplest to just look at our proposed groupings, and  
4 so we have a "group configuration" term --

5 THE COURT: Yes, sir.

6 MR. VERHOEVEN: -- and a "zone configuration" term, Your  
7 Honor.

8 THE COURT: Right.

9 MR. VERHOEVEN: And we said both of those are indefinite.  
10 If it -- if I may, I'd like to address those both together  
11 because they're indefinite vis-à-vis each other.

12 THE COURT: Okay. Sure.

13 MR. VERHOEVEN: Okay. So if we could go to Slide 22.

14 So the issue here is, we've got two terms, "zone  
15 configuration" and "group configuration." And we've argued  
16 they're indefinite because in -- a person of ordinary skill,  
17 Your Honor, would not be able to determine when one begins and  
18 when another begins and ends.

19 And so the issue is, does the intrinsic evidence provide  
20 enough guidance to a person of ordinary skill to know if  
21 they've met or not met the group configuration and zone  
22 configuration elements.

23 If you go to the next slide, please.

24 So basically, pictorially, Your Honor, this is our  
25 argument, which is on Slide 23, which is, this -- we don't know

1 where one begins, one ends, whether one's included in the other  
2 or not, to what extent.

3 And so that's the indefiniteness. I mean, phrase "group  
4 configuration" itself is not indefinite by itself, neither is  
5 zone configuration, if they were just next to each other -- or  
6 excuse me, if they were just stated in isolation.

7 But if you look at the way the claims talk about them,  
8 it's very -- it's just impossible to tell the difference.

9 If you go to Slide 25.

10 Here it is in the claim for Your Honor. I know you'd like  
11 to look at the claim. So here -- this is Claim 1 of the '206  
12 patent. I've highlighted the portion where it talks about  
13 these things.

14 And it says: The zone configuration characterizes one or  
15 more zone scenes, each zone scene identifying a group  
16 configuration.

17 So it says both zone configuration and group configuration  
18 in the same sentence. And it's what I refer to as a  
19 syntactical ambiguity. It's -- we don't know, is group  
20 configuration meant to be a synonym for zone configuration? Is  
21 it something different? If it's different, what is it?

22 That's the problem we have with these two terms, Your  
23 Honor.

24 Now, there's no dispute that both sides agree that these  
25 terms can't be construed to mean the same thing because they

1 have different words. One's zone configuration and one's group  
2 configuration. So that's undisputed, Your Honor. They must  
3 have different meanings.

4 But when you look at the specification, the claim doesn't  
5 provide any clarity. When you look at the specification, it  
6 makes things worse, Your Honor.

7 So if we can go to the next slide.

8 If you look in the specification -- this is Slide 26, and  
9 I'm highlighting the common spec from the '206 patent,  
10 Column 5, 43 through 50 and 54 through 59. And as you'll see  
11 here, Your Honor, this is what the spec says: Zone group  
12 configuration characterizing a zone group.

13 And then it repeats it: Typically, a saved zone group  
14 configuration file is transmitted.

15 And so again, the specification doesn't provide any  
16 clarity on when you have a zone configuration versus a group  
17 configuration, even though both parties agree that these two  
18 phrases must have separate meanings.

19 Next slide.

20 We provided an expert witness who's stated he's gone  
21 through this and can't tell the distinction. I know -- I'm not  
22 going to rely on my own expert. I'll rely on the other side's  
23 expert, Your Honor.

24 So if we can go to the next slide.

25 One of the reasons that's glaringly obvious as to why this

1 is a problem is even their own expert can't distinguish zone  
2 configuration from group configuration. So he was asked at his  
3 deposition -- this is Mr. Almeroth: Can you provide an example  
4 of a zone configuration?

5 And this is his transcript at Page 53, Lines 15 through  
6 54, Line 2. And his answer eventually is: I don't have an  
7 example.

8 And then the next slide, please.

9 We asked him the same thing about group configuration.  
10 This is from the transcript at Page 58, Line 22 through 59,  
11 Line 18:

12 "Can you give me example of a group configuration?

13 "Answer: That's not something I tried to do.

14 "Question: You can't provide me a single example of a  
15 group configuration?

16 "Answer: I would need to give it some thought."

17 So even the other side's expert, when we've -- we've teed  
18 this up as an indefiniteness problem, was unable at his  
19 deposition, knowing that in advance, to provide any examples of  
20 how to distinguish one from the other. I think that's telling.

21 In addition, the evidence that the expert relies -- their  
22 expert relies on to provide a distinction is the same evidence  
23 we just looked at.

24 Can we go to the next slide?

25 So here's his declaration, and I just highlighted in green

1 where the cites are. And we put those cites up on the next  
2 slide, please.

3 This is Slide 31. These are the same excerpts we've been  
4 looking at. So this is Column 5, Line 43 through 57, and  
5 Column 7, Line 31 through 33. And again, as I showed you  
6 before, it just says "zone group configuration" here, Your  
7 Honor. So their expert points to the same thing I just pointed  
8 to, which provides no guidance whatsoever.

9 Next slide.

10 In its opposition brief, Sonos provides an attempted  
11 distinction between two, Your Honor. They say that a zone  
12 configuration is different because it "comprises a data  
13 representation of a zone scene."

14 And then they continue and they say: Group configuration  
15 provides a previously-saved grouping.

16 So apparently, from reading this, Your Honor, the best I  
17 can tell is the distinction they're drawing is they say that a  
18 zone grouping is the saved grouping -- or excuse me -- a zone  
19 configuration is a saved grouping and a zone configuration is  
20 simply a data representation of that same saved grouping, which  
21 doesn't make any sense and is inconsistent with the actual  
22 claims of the patent.

23 Go to the next slide.

24 Next slide.

25 This is Slide 34, Your Honor, and I put up Dependent

1 Claim 7. And it's talking about this "further configured to."

2 And this is Dependent Claim 7, dependent on Claim 1.

3 And it says: Further configured to: Before receiving the  
4 zone configuration, send, to one of plurality of independent  
5 playback devices, a command to save at least one of the one or  
6 more zone scenes.

7 Well, then zone scene is already saved before the zone  
8 configuration is received. So it can't be true that a zone  
9 configuration is simply a later-created data representation of  
10 a zone scene. It's inconsistent with the dependent claims of  
11 the patent.

12 So long story -- in sum, Your Honor, this is -- the reason  
13 we've argued for this is because we want -- we should be able  
14 to -- be able to determine what is a zone configuration, what  
15 is a group configuration, and are we doing one or not?

16 And here, if you look at the intrinsic evidence, there's  
17 no guidance for us. And as a result, we can't distinguish  
18 between the two.

19 That's all I have to say on that one, Your Honor.

20 THE COURT: Thank you, sir. Can -- I'm not sure who will  
21 be representing Sonos on this.

22 MR. SHEA: Your Honor, it's going to be Rory Shea again on  
23 behalf of Sonos.

24 THE COURT: Mr. Shea?

25 MR. SHEA: Okay. Great.

1 I'm going to share some slides, Your Honor, here. One  
2 moment.

3 So, Your Honor, I think -- with respect to these phrases,  
4 I think we want to start right with the claim language and look  
5 at what that claim language actually says. And the discussion  
6 we just had a bit ago about zone scenes and what a zone scene  
7 is and Your Honor's construction of that term now, I think,  
8 sheds a lot of light on this.

9 What the claim element at issue says and the terminology  
10 that defendant is objecting to says is that you have a zone  
11 configuration that characterizes one or more zone scenes where  
12 each zone scene is identifying a group configuration associated  
13 with zone player -- with two or more of a plurality of  
14 independent playback devices.

15 So when we take this phrase and we look at this language  
16 step by step, just on the face of the language alone, Your  
17 Honor, it's clear what the differences are here.

18 So starting with group configuration, what that is, it's a  
19 configuration of a group. It's a grouping of zone players for  
20 synchronous playback and, effectively, it's some makeup or  
21 arrangement of zone players that are linked together into a  
22 (inaudible). That's what the phrase "group configuration"  
23 means in the context of this claim.

24 And what the claim says is that you have a zone scene that  
25 identifies such a group configuration, which makes sense. It's

1 in fact, exactly what we just talked about and what Your Honor  
2 has rendered as his construction for zone scene. A zone scene  
3 is a previously-saved grouping, or in other words, a  
4 previously-saved group configuration of zone players that,  
5 according to Your Honor's construction, would be according to a  
6 common theme.

7 So that's what a zone scene is. A zone scene identifies  
8 this group configuration, this arrangement or makeup of  
9 players.

10 So that phrase, looking at that phrase in context of the  
11 claim, is clear. You have a zone scene, it identifies a group  
12 configuration.

13 The preceding clause then says that you have a zone  
14 configuration that characterizes one or more zone scenes. And  
15 when you look at what zone configuration is, both there and  
16 elsewhere in the context of this claim, it's clear that what  
17 zone configuration here is, is it's some configuration data,  
18 some form of data that characterizes or provides information  
19 about one or more zone scenes, where each of those zone scenes  
20 identifies a group configuration.

21 And so that was -- that is what our construction of zone  
22 configuration was, Your Honor. But again, there is a clear  
23 distinction here between the two. Group configuration is --  
24 it's just a configuration of a group. It's a makeup or  
25 arrangement of players that are within a group. In this case,

1 it's going to be a previously-saved group that's according to a  
2 common theme because of the zone scene language.

3 But that's what the group configuration is. It's that  
4 component of the zone scene that tells you which zone players  
5 are in that -- have been selected for inclusion in that zone  
6 scene.

7 And then zone configuration is something that  
8 characterizes one or more zone scenes. It's some sort of data  
9 that provides information or characterizes about those zone  
10 scenes.

11 And if we look at the other aspects of the claim with  
12 respect to the zone configuration, it just confirms that's what  
13 the term "zone configuration" means. It's this configuration  
14 data.

15 Specifically, it talks about the fact that it is something  
16 that's configured via a controller. It's maintained at the  
17 playback device. So after the group is saved, the zone scene  
18 is saved, it would be maintained at the playback device. It's  
19 received by the multimedia controller via a network interface  
20 and then is subsequently used to display the selectable  
21 indication.

22 So when you look at zone configuration in the context of  
23 that claim, that's what it's talking about. It's talking about  
24 some data set that gets passed back and forth between the  
25 controller and one or more of the players that serves to

1 characterize or provide some information about the zone scenes  
2 that have been saved in the -- in this system.

3 And not only do the claims tell you that's what zone  
4 configuration is, but that's -- the specification is consistent  
5 there as well, Your Honor. It says here that -- first of all,  
6 it's in the '206 patent at 5:51 through 57. This is on our  
7 Slide 36 -- that: According to one embodiment of the  
8 invention, the memory is used to save one or more saved zone  
9 configuration files that may be retrieved for modification.

10 So that's telling us that zone configuration in this  
11 context refers to configuration data.

12 Later on in the specification at 10:10 through 17, it also  
13 tells us that when a scene is saved, a set of data pertaining  
14 to that scene is stored. And those -- that's what this zone  
15 configuration is talking about. It's talking about this data  
16 that characterizes the zone scenes that have been saved in  
17 the -- in the system.

18 Now, you know, Your Honor, one other thing I wanted to  
19 address, defendants have actually raised a new argument for the  
20 first time now regarding this dependent claim as supposedly  
21 providing some sort of ambiguity or supporting their position  
22 on this. I want to address that as well. I'm going to pull it  
23 up in the context of the specification here.

24 I actually don't fully understand the argument, Your  
25 Honor, but what this claim says is that before the controller

1 receives zone configuration, so before the controller receives  
2 that data, it sends a command to save a scene. And so -- but  
3 how that supports any sort of concern about the meaning or  
4 difference between these terms doesn't make any sense to me.

5 What we're talking about here is, the zone configuration  
6 data is something that comes into existence when the zone scene  
7 is saved and would be initially maintained at the player. It's  
8 maintained at the player, and it's configured via the  
9 controller and maintained at the player and then subsequently  
10 received at the controller.

11 So there's no issue there -- or there's no temporal  
12 problem in what these -- this claim is saying. It all fits  
13 together perfectly.

14 You have a zone scene that identifies that group  
15 configuration. Once you save that zone scene, which could take  
16 place in the context of this claim via a command from the  
17 controller to save it, that's going to create some data --  
18 configuration data -- "zone configuration" is the term used in  
19 the claim -- that's going to be maintained at the player. And  
20 then when the controller subsequently wants to present that  
21 information to a user so that they can select one of those zone  
22 scenes to listen to player -- audio on the players, the  
23 controller would then retrieve and receive that data, that  
24 configuration data, and use it to render this selectable  
25 indication on the screen.

1           So there's no ambiguity here in terms of what this -- the  
2 Claim 7, Dependent Claim 7 says.

3           Now, maybe, Your Honor, the last thing I just want to  
4 address is, with respect to the expert testimony, I mean,  
5 what -- our expert was not asked if he could distinguish  
6 between zone configuration and group configuration or provide  
7 examples of how to distinguish between them.

8           He was asked, in isolation, on the fly, whether he could  
9 provide examples of what a zone configuration is or what a  
10 group configuration is.

11           The fact that he was unwilling to do that on the fly  
12 during the deposition is not the test for indefiniteness, of  
13 course. The test is whether the language would be reasonably  
14 understood by a person of ordinary skill in the art in the  
15 context of the intrinsic evidence and the claim language.

16           And again, we believe that, really, based on the claim  
17 language alone, that is the case and in view of how this claim  
18 language is phrased and what a person of ordinary skill in the  
19 art would understand the term zone scene to mean in the context  
20 of this specification along with the other two terms.

21           THE COURT: Mr. Verhoeven?

22           MR. VERHOEVEN: Yes, Your Honor. Really briefly. I'll  
23 just use this slide that they have up here, Slide 34.

24           Counsel spoke for a long time, but I couldn't distinguish  
25 what a group configuration or a zone configuration was based on

1 what he said. I mean, he said a group -- a zone scene  
2 identifies a group configuration. I wrote that down, that's  
3 what he said.

4 And then he said a zone configuration is any data --  
5 that's any information, and they have it right here -- that  
6 provides an indication of one or more zone scenes.

7 Well, isn't that -- that's what they just said a group  
8 configuration was. So if they mean -- what do they mean by  
9 "provides an indication of," Your Honor?

10 I mean, the group configuration is the configuration of  
11 the players within a zone scene, is what they say. So what's a  
12 zone configuration? Is it the same thing? Is it different?

13 All they can come up with, Your Honor, is configuration  
14 data that provides an indication of one or more zone scenes.

15 And first of all, none of this is -- this is all attorney  
16 argument. None of it's in the specification.

17 And secondly, even with this attorney argument, the  
18 distinctions break down when you start looking at them.

19 That's all I have to say, Your Honor.

20 THE COURT: Mr. Shea, anything else?

21 MR. SHEA: Your Honor, unless you have any specific  
22 questions -- I mean, I could address further -- I think it's  
23 laid out in our brief. So to keep it brief for you, I would  
24 say, unless you have other questions, I don't have anything to  
25 add.

1 THE COURT: I'll be back.

2 (Pause in proceedings.)

3 THE COURT: If we can go back on the record.

4 If you'll give me one second.

5 For the claim terms "zone configuration" and "group  
6 configuration," the Court is going to amend its construction  
7 and find that both these claim terms are indefinite.

8 What is the next claim term that we need to take up?

9 MR. SHEA: Your Honor, do I have any ability to respond to  
10 that?

11 THE COURT: Not much. I mean, I've found that the -- I've  
12 made my decision. I'm ready to move on.

13 What is the next claim term?

14 MR. VERHOEVEN: Your Honor, the next term in the zone --  
15 if we want to stick with "zone," which I think is most  
16 efficient, with the "zone" terms, the next term is one you've  
17 ruled in your tentative is indefinite. It's the "causing the  
18 selectable indication."

19 THE COURT: Right.

20 MR. VERHOEVEN: It's a dependent claim. We are -- we're  
21 perfectly happy with the tentative, Your Honor, but I suspect  
22 the other side may want to argue, but I'm not sure.

23 THE COURT: No. I'm sure they do.

24 Mr. Shea, is that you taking up causing --

25 MR. RICHTER: No. I think -- I apologize, Your Honor. I

1 think that'll be me. Cole Richter for plaintiff Sonos.

2 THE COURT: Mr. Richter.

3 MR. RICHTER: Yes. Thank you, Your Honor. And if I can  
4 share my screen, I can bring my slides up here.

5 Okay. I'd like to go starting with Slide -- or starting  
6 with Slide 12 and then on to 13 and 14.

7 "Causing the selectable indication" is a phrase that  
8 appears in Claim 19 of the '206 patent. And, Your Honor, both  
9 sides agree that this -- well, actually, no.

10 Sonos --

11 THE COURT: Mr. Richter, I'm having a hard time hearing  
12 you. You might want to lean a little closer to the microphone,  
13 perhaps.

14 MR. RICHTER: Yes. How's this, Your Honor? I'm using an  
15 earpiece, so it may be --

16 THE COURT: That's good.

17 MR. RICHTER: Thank you.

18 This claim and one other claim that I can get to later,  
19 these claims, Sonos contends, have typographical errors. And  
20 the preliminary indication from this Court is that these claims  
21 should be indefinite, but, you know, Sonos requests that the  
22 Court correct these typographical errors. And with such a  
23 correction, the indefiniteness problem falls away.

24 So as you can see here on the screen, Claim 19 presently  
25 depends from Claim 17. This should -- Claim 19 should actually

1 depend from Claim 18. And when it does, the antecedent problem  
2 falls away, and there's no more indefiniteness. And I can show  
3 you why this should be the case with two more slides.

4 So first, on Slide 14, we know that Claim 19 should depend  
5 from Claim 18 because we can look at a mirror image set of  
6 claims with Independent Claim 12, Dependent Claim 13 and  
7 Dependent Claim 14.

8 In this set of claims, actually, Claim 13 depends from  
9 Claim 12, and then Claim 14 depends from Claim 13. These are  
10 mirror image claims to Claim 17, 18 and 19 in all respects  
11 except for this error. Claim 12 is a method, and Claim 17 is a  
12 CRM.

13 And so, like Claim 14, which depends from Dependent  
14 Claim 13, that's what Claim 19 should do. It should depend  
15 from Claim 18 instead. And you can see here -- here's the  
16 language -- "at least one of the one or more zone scenes"  
17 provides the antecedent for the "at least one of the one or  
18 more zone scenes."

19 So Sonos just respectfully requests that the Court correct  
20 the error, and the indefiniteness problem would fall away.

21 So if Your Honor has any questions, I'm happy to entertain  
22 those. Otherwise, I would pass the mic.

23 THE COURT: Mr. Verhoeven?

24 MR. VERHOEVEN: Really briefly. Can we put up our slides,  
25 please, and go to Slide 35?

1           So this is the one about antecedent basis, Your Honor, and  
2 we're talking about a dependent claim. And the issue is  
3 whether or not the lack of the antecedent basis renders it  
4 indefinite. Your Honor's tentative finds that it does.

5           Let's go to the next slide.

6           If you look at the claims themselves, Claim 19 says: The  
7 computer readable medium of Claim 17, wherein causing the  
8 selectable indication of the at least one of the one or more  
9 zone scenes to be displayed comprises...

10          And then it goes on. If you look at the antecedent, Claim  
11 17, there is no antecedent basis for this highlighted phrase.  
12 Instead, the antecedent is selectable indication of the  
13 received zone configuration, not the at least one or more zone  
14 scenes. So we pointed this out and said that this renders it  
15 indefinite. In response --

16          Next slide.

17          -- we were told that this is an obvious error, "an obvious  
18 scrivener's error."

19          Next slide.

20          As Your Honor knows, undoubtedly, the standard here, if  
21 someone says there's an error and asks the Court to correct it,  
22 is this test of *Novo Industries*, 350 F.3d 1348, and I'm citing  
23 to 1357, where it says: A district court can correct a patent  
24 only if the correction is not subject to reasonable debate  
25 based on a consideration of the claim language and the

1 specification.

2 Next slide.

3 There's no debate here, Your Honor. Claim 19 says: The  
4 computer readable medium of Claim 17. There's no ambiguity.  
5 There's no debate that this is referring the person of ordinary  
6 skill to Claim 17, not Claim 18.

7 And as Your Honor knows, patentees freely write dependent  
8 claims on -- that depend from various other earlier claims.  
9 And there's absolutely no reason why a person of ordinary skill  
10 in the art would look at this and say, aha, I can tell they  
11 must have meant Claim 18, not Claim 17.

12 It's unambiguous. It directs the reader to Claim 17, and  
13 now we have an admission, through the briefing process, that  
14 there is no antecedent basis.

15 Next slide.

16 The argument you heard was that you should substitute the  
17 reference to Claim 17, delete that and replace it with Claim  
18 18, but -- and we think that's inappropriate because of the  
19 argument we just made.

20 THE COURT: Mr. Verhoeven, can you hold on for just one  
21 second?

22 MR. VERHOEVEN: Yes, Your Honor.

23 (Pause in the proceedings.)

24 THE COURT: If we can go back on the record.

25 Let me go back to counsel for the plaintiff. I am -- my

1 concern is on Slide 40, which is up, if the -- if I could hear  
2 from plaintiff as to why the difference between in 18 -- Claim  
3 18, it saying "of the received zone configuration" and, in 19,  
4 it says "of the at least one of the one or more zone scenes,"  
5 why that doesn't make your argument harder, that it's obvious  
6 that it should have been 18 instead of -- it should have been  
7 Claim 18 from which Claim 19 depended rather than Claim 17,  
8 which is contained in Claim 19.

9 MR. RICHTER: Sure.

10 THE COURT: I said all that to try and make clear on the  
11 record what I was asking, but I think you got my point.

12 MR. RICHTER: Yes, indeed, Your Honor.

13 So the antecedent for "the at least one of the one or more  
14 zone scenes" actually comes from the phrase that is not  
15 highlighted by the defendant on the screen.

16 So we see: Comprises causing an indication of the at  
17 least one of the one or more zone scenes to be displayed. And  
18 so that's the antecedent. And when I showed it on my slide,  
19 actually I had bolded the text. And that came from plaintiff's  
20 Slide 13 and 14. But that provides antecedent of at least one  
21 of the one or more zone scenes to be displayed.

22 And if -- I'm hoping that answers your question, Your  
23 Honor, but I'm happy to clarify it more.

24 THE COURT: It did.

25 Mr. Verhoeven, if you want to -- if you'd like to respond

1 to that. And then I'll come back to you, Mr. Richter, in just  
2 a second.

3 MR. RICHTER: Okay. No problem.

4 MR. VERHOEVEN: Yes, Your Honor.

5 So first of all, the biggest hurdle would be, how on Earth  
6 would we know that when they say Claim 17 they meant Claim 18  
7 when it expressly says Claim 17?

8 And that's --

9 THE COURT: I'm over -- I mean, you and I might disagree  
10 on that. I can handle that one.

11 MR. VERHOEVEN: Okay. And then on this one --

12 THE COURT: You and I might disagree about how in the  
13 world someone would know that, and this is actually one where I  
14 don't think I would be completely wrong if I said that, if you  
15 were on the other side having to make this argument, you could  
16 probably do so with a straight face.

17 Certainly the argument that it should have been 18 and not  
18 17 is a colorable one. And so I understand why you're saying  
19 it isn't, I understand why they are. But I'm concerned now  
20 about whether or not 18 actually provides --

21 MR. VERHOEVEN: I'm sorry, Your Honor.

22 Yes. To answer your direct question directly, no.  
23 Because I'm a person of ordinary skill in the art and I'm  
24 looking, saying, I didn't find the antecedent in 17, maybe they  
25 meant 18, which I doubt they would do, but if they did that,

1 when you're looking at 18, the phrase is -- in 19 is "causing  
2 the selectable indication of the at least one or more zone  
3 scenes."

4 Here in 18, it says: Wherein causing the selectable  
5 indication of the received zone configuration to be displayed.

6 So what they're talking about, the selectable indication  
7 that's to be displayed, are different things, Your Honor. And  
8 so that further clouds any argument that a person of ordinary  
9 skill in the art would know to go to 18, and that's why we put  
10 this up here.

11 I have nothing further, Your Honor, unless you have  
12 questions.

13 THE COURT: I don't. If y'all will give me just one  
14 second.

15 (Pause in proceedings.)

16 THE COURT: So here's what I'm going to do, and I'm trying  
17 to do my best to protect everyone's record here on appeal. My  
18 sense is, given my prior ruling with regard to indefiniteness,  
19 this claim term would have issues anyway.

20 That being said, I don't know that I'm correct or not  
21 correct once this appellate court were to review my earlier  
22 claim construction.

23 And so I'm going to go ahead and rule on this anyway. And  
24 I'm going to -- were -- had I not ruled earlier with regard to  
25 the invalidity of some of the claim terms that are involved

1 here, I would find that this was a mistake and that it should  
2 have been 18 rather than 17 and that there would be antecedent  
3 basis and it would not be indefinite. But I think -- my sense  
4 is that that's probably a pyrrhic victory for the moment at  
5 least.

6 So let's move then to the final -- I think there's just  
7 one indefinite claim term to take up left, correct?

8 MR. RICHTER: Yes. I think that's right, Your Honor. And  
9 I think that's "a media particular playback system," which is  
10 in the '615 patent.

11 THE COURT: I'm having a hard time -- I don't know why,  
12 maybe it's just me and I'm old, but I'm -- if you'll make sure  
13 your sound's turned up. I want to make sure I can hear you.

14 MR. RICHTER: No problem. I apologize for that.

15 THE COURT: No apology needed.

16 MR. RICHTER: And so let me share my screen again, if  
17 you'll permit me.

18 And this is a dependent claim in the '615 patent, Your  
19 Honor, actually three dependent claims. And they -- this one  
20 also contains a stray word, and I'll show you how that  
21 occurred.

22 But here's the phrase in red in Claim 3. It says: A  
23 media particular playback system that includes a first zone and  
24 a second zone.

25 And so Sonos, again, is asking the Court to strike the

1 word "particular." That doesn't belong there. It doesn't make  
2 any sense. It was a type -- woops. I'm sorry about that. It  
3 was a typographical error that was introduced during the  
4 prosecution history, and I'll show you why that's the case.

5 Again, this is the same -- woops. This is the same case  
6 that -- actually, let me shrink this down a little bit.

7 This is the same case that -- well, not the same case, but  
8 the same test that defendants have shown. The Court allowed to  
9 correct errors in the claim when two conditions are met: The  
10 correction is not subject to reasonable debate based on the  
11 consideration of the claim language and the specification -- I  
12 think that phrase is important -- and, two, the prosecution  
13 history does not suggest an alternative interpretation of the  
14 claims.

15 And both of those conditions are met here.

16 If we take a look at the prosecution history, in an Office  
17 Action Response filed in 2016, Your Honor, the applicant needed  
18 to identify -- needed to add a tag to identify playback device.  
19 And the word they chose was "particular." We see that in here  
20 Claim 1, underlined.

21 And in order to provide this antecedent in the rest of the  
22 claims, the applicant added the word "particular" in front of  
23 all the instances of playback device. And I've highlighted  
24 those in yellow in Claim 3 here on Slide 19.

25 But in doing so, it must have been a find-and-replace

1 error. They added particular playback -- they added the word  
2 "particular" in front of playback, but this was playback system  
3 and not playback device. There's -- that's clearly an error.

4 Again, "media particular playback system" is a phrase that  
5 doesn't make sense. You won't find that phrase in the  
6 specification, Your Honor.

7 There was no reason to distinguish -- or to provide any of  
8 the reasons that Google says -- or do any of the work that  
9 Google says this word does. There was no prior art reason that  
10 the applicant needed to do that. And actually, it's a  
11 little -- it's a little curious -- and again, apologies for the  
12 screen there.

13 It's a little curious that the applicant would need to do  
14 that for Claim 3 but not the other claims. I mean, this just  
15 further illustrates why this was a typo.

16 Dependent Claim 2, that you can see here, includes a very  
17 similar phrase, a very similar limitation here, "detecting a  
18 set of inputs to transfer playback from the control device to a  
19 zone of a media playback system," but here, the applicant did  
20 not insert the word "particular."

21 And so again, this is a claim that should -- these should  
22 be mirror images except for some other limitations that aren't  
23 really important. Particular here is just a stray word that  
24 was added accidentally.

25 And so again, we would request, rather than, you know, an

1 extreme holding of indefiniteness, that the Court exercise its  
2 discretion to just strike this word that's clearly a typo.

3 And I'm happy to answer any questions Your Honor might  
4 have, but also happy to pass the mic over to Mr. Jaffe.

5 THE COURT: Mr. Verhoeven, if you'll give me just one  
6 second. And it may be someone else, I know, but if y'all will  
7 give me just one second.

8 MR. VERHOEVEN: Yes, Your Honor.

9 (Pause in the proceedings.)

10 THE COURT: Let me ask plaintiff's counsel, before I turn  
11 to counsel for Google: I -- as I just showed, I'm -- frankly,  
12 even though I was not a patent prosecutor and could never have  
13 qualified to be one, I am still somewhat sympathetic to that  
14 mistakes can be made; and if they really are just scrivener  
15 errors, they can be addressed by the Court, which is an  
16 efficient way of dealing with it.

17 But I'm having a hard time with this one, with the way  
18 this -- the way the amendments were made, how I could meet the  
19 standard I'm supposed to meet, that this was -- that this was a  
20 scrivener error.

21 I'm having a hard time with that. If you could help me  
22 one more time with that before I turn it over to Google's  
23 folks.

24 MR. RICHTER: Yeah. No. I'm happy to address that, Your  
25 Honor.

1       The scrivener's error comes actually from the way that we  
2 look at how the amendments were made and the fact that the  
3 amendments being made on October 25th, 2016 were to insert the  
4 word "particular" before playback. And the fact that the  
5 applicant carried that through, you know, perhaps with a less  
6 than attentive, you know, attention to detail than we would've  
7 liked, they carried that through.

8       And that explains how you find the word "particular" in  
9 the wrong place, where it doesn't make any sense, and why, for  
10 instance, the applicant didn't add the word "particular" in  
11 response to the examiner saying, hey, you know, you've got a  
12 prior art problem here, applicant. You've got to add the word  
13 "particular" because that will distinguish from media systems  
14 that don't play MP3s, for example.

15       None of that is -- was in the record. None of that was in  
16 the file history. There was no reason -- no prior art reason  
17 to do this. And I think if you compare it to the other claims,  
18 that's why you see that this word is just a stray word.

19       And let me address just one more time the standard, and  
20 it's -- one, the correction's not subject to --

21       THE COURT: Well, I'm having a hard time following how  
22 that could be a stray word in this situation. I mean, it's --  
23 I don't get that. I'm not -- when I say "I don't get it," I  
24 mean, it's not like when you speak in Mandarin, I don't get  
25 Mandarin. I mean, I'm saying here, I'm hearing your argument

1 and your argument doesn't make sense to me.

2 MR. RICHTER: Okay. No problem. Let me just take --  
3 maybe we can walk through the amendment here and -- to show how  
4 it was erroneously inserted.

5 So the relevant portion of Claim 1 being amended in this  
6 Office Action Response was directed to this "detecting a set of  
7 inputs to transfer playback from the control device to a  
8 playback device." And what the applicant needed to do was  
9 insert a label here to identify the given -- or the individual  
10 playback device that it would reference throughout the  
11 remainder of Claim 1 and the rest of the amendments.

12 So the applicant had to add the word "particular" in front  
13 of playback device. And so the applicant did that.

14 Here you find another recitation of it.

15 And then in Claim 3, you see here every instance you've  
16 added the word "particular" to provide the antecedent that the  
17 applicant introduced in Claim 1.

18 So we have particular playback device, particular playback  
19 device, particular playback device, and finally particular  
20 playback device. But in red right here, it doesn't say  
21 particular playback device. They added the word "particular"  
22 in front of playback, but they forgot that it says "system"  
23 instead.

24 So adding the word "particular" here seems to be a result  
25 of attempting to provide antecedent basis back to what the

1 applicant introduced here but just adding it in a place that it  
2 didn't need antecedent basis. And that -- and by doing so,  
3 kind of created this scrivener's error. Like, there was no  
4 reason to put the word "particular" in the phrase "media  
5 particular playback system." No prior art reason and, in fact,  
6 no specification reason because the specification doesn't use  
7 that phrase.

8 And, you know, (inaudible) that phrase doesn't even make  
9 any sense. That's not how you would refer to a -- "media  
10 particular playback system," that just doesn't make sense.

11 And so I think, you know, looking at the -- this  
12 amendment, the insertion of the word "particular" in this  
13 October 25th, 2016 response and then also comparing it here to  
14 other claims that recite virtually identical limitations that  
15 don't contain the word "particular" kind of demonstrates that  
16 this "particular" is a stray word. It should not have been  
17 Control V-d or pasted into that response, and we would  
18 respectfully request the Court to correct that.

19 THE COURT: If you guys will give me a few seconds.

20 (Pause in proceedings.)

21 THE COURT: I think -- I just don't think I have the power  
22 to do this. I think maybe the Patent Office does. But I don't  
23 think this is a scrivener's error. It may have been a mistake  
24 during the prosecution and maybe the Patent Office can address  
25 it through some manner they have, but I don't believe I can.

1 I'm going to maintain the construction of it being  
2 indefinite.

3 I think that's all the claim terms we have, isn't it?

4 MR. JAFFE: Your Honor, this is Jordan Jaffe on behalf of  
5 Google. We had one additional term that we wanted to raise,  
6 which was the "instruction" phrase for the '033 patent.

7 THE COURT: Give me one second to find it. Oh, I got it.  
8 I'm sorry I just -- that was my bad. I just missed it. I  
9 apologize.

10 MR. JAFFE: No problem.

11 Mr. Vaughan, if you don't mind putting up Slide 49 of our  
12 presentation.

13 So this is in the '033 patent, which is part of the two  
14 patents that Sonos refers to as the "direct-play patents." And  
15 it's actually a longer phrase, and we've only excerpted here.  
16 But it's an instruction for at least one given playback device,  
17 and then it continues.

18 And there's only one issue that Google is disputing here,  
19 which is whether the instruction, as written, has to be one  
20 instruction that performs the limitations of the claim or,  
21 according to Sonos, whether then it can have multiple  
22 instructions each performing part of the instruction that's  
23 claimed. And so let me explain what I mean by that.

24 If we can go to Slide 50, please.

25 So I've excerpted here Claim 1 of the '033 patent. And

1 what I've highlighted in yellow here, which is again Claim 1,  
2 is the longer phrase that we're asking for the construction.  
3 And speaking broadly about what the claim is talking about  
4 here, just to set the context, is we're talking about a system  
5 in which you are, you know, let's say, listening to music on  
6 your phone or other sort of computing device and then you want  
7 to transfer playback from your phone to a remote device, let's  
8 say, a TV or a speaker of some kind.

9 And what the '033 patent talks about, again, broadly  
10 speaking here, is "transmitting an instruction for the at least  
11 one given playback device to take over responsibility for  
12 playback of what it refers to as the remote playback queue."

13 So you're transferring playback responsibility from, let's  
14 say, the device you're holding in your hand to a remote  
15 speaker.

16 And then further, it talks about this instruction  
17 performing these next few additional items.

18 So if we can go to the next slide, please.

19 So I've highlighted in blue here the two requirements that  
20 are laid out for this instruction. The first requirement is  
21 what I was just referring to, to "take over responsibility for  
22 playback of the remote playback queue."

23 But the claim continues, and this was also language that  
24 was added during prosecution, where it talks about: Wherein  
25 the instruction -- the instruction configures the at least one

1 given playback device to perform what we refer to as three  
2 subsets -- these three items listed here -- communicate, use  
3 the obtained data, and play back the retrieved at least one  
4 media item.

5 So again, what the claim is talking about here is  
6 transmitting an instruction that does, one, what the first red  
7 box here does, take over responsibility for playback of remote  
8 playback queue and, two, where the instruction, that  
9 instruction, configures the playback devices to perform these  
10 three substeps here.

11 And so our position is that "the instruction," there has  
12 to be one instruction that performs what's in these two boxes.  
13 Again, this is not to say that you can't have several other  
14 instructions in a system. We're not trying to read out the  
15 comprising and the preamble. We're not saying that there can't  
16 be more instructions.

17 All we're saying is that there has to be one instruction  
18 that's transmitted, that takes over responsibility for  
19 playback, and configures the playback device to perform these  
20 three substeps. And we think there's Federal Circuit case law  
21 that's directly on point here.

22 If we can go to the next slide, please.

23 This is the Varma decision from 2016, which we cite in our  
24 briefing. In our briefing, we explained that this case was  
25 directly on point. And in the reply brief, Sonos didn't

1 mention it at all. So we think, at this point, it's undisputed  
2 that this is directly on point.

3 And just to compare what we're talking about in terms of  
4 this Varma decision to the claim language here, the decision in  
5 Varma is -- and I'm just going to read a bit here for context.  
6 It says: Here the question is not whether there can be more  
7 than one request in a claim-covered system: There can.  
8 Rather, the question is whether "a" can serve to negate what is  
9 required by the claim language following "a": A "request"  
10 (singular term) that "correspond[s]" to "two or more selected  
11 investments." It cannot. For a dog owner to have "a dog that  
12 rolls over and fetches sticks," it does not suffice that he  
13 have two dogs, each able to perform one of the tasks.

14 And so we think that this is directly on point for our  
15 situation. And just to underline that point --

16 If we can go to the next slide, please.

17 -- what I've done here on this slide is taken the quote  
18 from Varma that we just went through, and we can just plug in  
19 the specific parts of the construction that we're talking  
20 about -- or excuse me -- the specific parts of the claim that  
21 we're talking about from the '033 patent.

22 Again, the language that I just read on the left-hand  
23 side, we can just plug it in on the right-hand side, and it's  
24 directly analogous to our position. And I'm just going to read  
25 that here: The question is whether "a" can serve to negate

1 what is required by the language following "a": A  
2 ["instruction"] (singular term) that ["takes over  
3 responsibility"] and ["configures" "the at least one playback  
4 device" to perform these three substeps"]. It cannot.

5 If we can go to the next slide.

6 So here, we -- there has to be -- there can be a lot of  
7 instructions, but there has to be an instruction that takes  
8 over responsibility and performs these three substeps. So that  
9 is the main point.

10 So to use the more colloquial analogy, that the --

11 THE COURT: If you'll give me just one second. I'm going  
12 to look at your...

13 Okay. I'm good. Thank you.

14 MR. JAFFE: Sure. So I was just going to go through the  
15 more colloquial example here from the Federal Circuit. We've  
16 got to have a dog that rolls over and fetches sticks. We can't  
17 have one dog that fetches sticks and one dog that rolls over.

18 And that's the same thing that we're talking about here in  
19 our claim language. There has to be an instruction that  
20 takes over responsibility and configures the at least one  
21 playback device to perform these three substeps.

22 And so that's -- this is directly on point to what we're  
23 talking about. We think it's clearly required by the claim  
24 language.

25 If we can go to the next slide.

1        If there was any doubt that this was the right  
2 construction, we think that that doubt is removed by the  
3 prosecution history here. And in particular, the applicant,  
4 during prosecution, expressly distinguished prior art that used  
5 multiple messages or instructions here.

6        And I've excerpted here -- and this is Google's response  
7 brief, Exhibit 17 -- where they -- where the applicants  
8 distinguish the Gran reference. And they said, the problem  
9 with this Gran reference is it "must continuously direct the  
10 media-rendering device." That is, it must continually send  
11 these messages, as compared to them, which only transmitted an  
12 instruction.

13        But the applicant actually went even further and said, the  
14 problem with Gran is it doesn't transmit that instruction. It  
15 continuously directs the media device. But it also does not  
16 transmit such an instruction, singular, that configures the  
17 media-rendering device to perform these three substeps as  
18 recited in applicant's independent claims.

19        So we think that under the Varma decision and the plain  
20 language itself, it's clear that we have to have an instruction  
21 that does both of these tricks, so to speak, but we also think  
22 that to the extent that there's any doubt about that, it's  
23 removed by the express distinguishing of the Gran reference  
24 during prosecution.

25        And with that, Your Honor, I can conclude, unless Your

1 Honor has any questions.

2 THE COURT: I don't. I'll hear from plaintiff.

3 MR. SMITH: Good morning, Your Honor. This is Dan Smith  
4 on behalf of Sonos. Let me just share my screen here.

5 Jordan, would you mind unsharing?

6 Okay. Your Honor, can you see my presentation here?

7 THE COURT: I can.

8 MR. SMITH: Okay. Great. And just, you know, I'm having  
9 a hard time seeing it. Is it -- oh, you know what? Sorry.

10 It looks like -- is that better now, the one that doesn't  
11 show the notes?

12 THE COURT: Yes. That's fine by me.

13 MR. SMITH: Okay. Okay. Great. Sorry about that.

14 Okay, Your Honor. Yeah. So I would like to comment on a  
15 number of things that Mr. Jaffe just raised. And, you know,  
16 let's just jump in. I won't go through the whole claim term  
17 here, as he's already done that. I don't want to waste the  
18 Court's time.

19 But, you know, I do want to start with the general rule  
20 here. I don't think there's any dispute here that the general  
21 rule in claim construction is that an indefinite article "a" or  
22 "an" in an open-ended patent claim, such as we have here, means  
23 one or more.

24 And while there are exceptions to this rule, the Federal  
25 Circuit has made clear that those exceptions are extremely

1 limited.

2 And here you can see I have an excerpt from the Baldwin  
3 Graphic case, and it states exactly that. And then at the end  
4 of that excerpt, it goes on to say, you know: An exception to  
5 the general rule means that -- or excuse me -- only arises  
6 where the language of the claims, the specification, or the  
7 prosecution history necessitate a departure from the rule.

8 As I'm going to walk you through here in a few moments,  
9 that's just not the case here with the '033 patent.

10 So first, Your Honor, I just want to -- what Google  
11 appears to be doing is, right, they're kind of conflating two  
12 separate, you know, limitations in this claim term. The first  
13 is what I've highlighted here in red.

14 And this is the portion of the claim that recites what the  
15 instruction is, right? It's "an instruction for the at least  
16 one given playback device to take over responsibility for  
17 playback of the remote playback queue from the computing  
18 device." And that is what the instruction is.

19 And notably, this instruction does not specify the exact  
20 number of instructions that can be transmitted, right? It  
21 doesn't say a single instruction, it doesn't say one  
22 instruction. It doesn't state what the exact contents of that  
23 instruction is, and I'll get to that in a moment because I  
24 think that's really what Google wants to do, is they want to  
25 import kind of what's in the next "wherein" clause into what

1 the instruction is. It doesn't do that.

2 Also, Your Honor, you know, it just doesn't say exactly  
3 how that instruction is transmitted. It doesn't say it's  
4 transmitted directly to, you know, the playback device or any  
5 other device.

6 So when you look at that, Your Honor, and you apply the  
7 general rule, we think it's very clear here that "an  
8 instruction" means one or more instructions.

9 But let's look at the "wherein" clause, which is really  
10 where Google has focused a lot of its intention here. And here  
11 the "wherein" clause states: Wherein the instruction  
12 configures the at least one given playback device to do three  
13 different functions.

14 And so again, just to be clear, that's talking about  
15 functions that the playback device is to perform after the  
16 instruction is transmitted. That's not talking about functions  
17 that are three separate elements or directions that must be  
18 included in the instruction itself, let alone a single  
19 instruction.

20 And that's really -- Google appears to be kind of blurring  
21 those two lines together and saying, well, these three  
22 functions and the "wherein" clause really need to be part of  
23 the instruction itself, and that's just not the case.

24 And, Your Honor, what I find ironic here is, Google has  
25 been -- you know, harped about, well, they didn't directly

1 address this case that's on point. But Sonos, in fact, cited  
2 a case -- a Federal Circuit case in its brief that's just as  
3 relevant and, in fact, we believe more relevant than the case  
4 that Google cited, and that's the Convolve case. And we would  
5 encourage the Court to look at that case.

6 But in the Convolve case, the term at issue was "a  
7 processor" that executes certain process steps, and then it  
8 lists three steps, believe it or not, with Roman Numerals I, II  
9 and III. In that case the Federal Circuit found that this term  
10 was not limited to a single processor despite the plurality of  
11 required "process steps" executed "a processor."

12 So, Your Honor, we believe that this case, again, supports  
13 Sonos' construction. And not only that, Your Honor, here  
14 again, as I just mentioned, it's not the instruction of Claim 1  
15 that even performs or executes those three functions, instead  
16 it's playback device. The instruction configures the playback  
17 device to do that.

18 So again, Your Honor, we believe that this Convolve case  
19 is on point. Google hasn't addressed this case.

20 Just to be clear, I just want to make sure it's clear to  
21 everybody, I mean, this is exactly what the claim says. This  
22 is Claim 9, one of the claims at issue in Convolve, talks about  
23 a processor which executes the process steps so as Roman  
24 Numeral I, II and III. And again, the Court found that that  
25 wasn't limited to a single processor, could have one or more

1 processors to execute those three functions.

2       So, Your Honor, let's next -- if we go back to the Baldwin  
3 case, it says there are exceptions, they're rare. You got to  
4 look for whether the claims, the spec or the prosecution  
5 history necessitate a departure from the rule. And we just  
6 went through the claims. Clearly they don't necessitate a  
7 departure from the rule.

8       Let's turn to the spec. Google fails to identify any  
9 disclosure in the specification that supports its attempt to  
10 limit an instruction to a single instruction. And, in fact,  
11 the specification does not limit -- does not place a limit,  
12 excuse me, on the number of instructions.

13       So now I want to turn to the prosecution history here,  
14 which Google, you know, addressed. And we believe that Google  
15 has mischaracterized the prosecution history, and we would  
16 encourage the Court to take a look at that Sonos response  
17 that's been cited in full.

18       But in sum here, as you heard Google just argue, and they  
19 did the same thing in their response brief, Google argued that  
20 Sonos distinguished the Gran reference because it required  
21 transmitting multiple continuous instructions rather than a  
22 single instruction to take over playback responsibility. And  
23 we believe that that's a mischaracterization.

24       Instead, as we explained in our brief, and I think what  
25 you'll see if you look at the response in full, while Sonos did

1 identify some teachings of Gran, including this continuous  
2 instruction, at the end of that, Sonos concluded that -- and,  
3 excuse me, distinguished Gran because the media-rendering  
4 device in Gran never takes over responsibility for playback of  
5 a remote playback queue from the control Element 100 regardless  
6 of the number of instructions.

7 Sonos never said that our claims require a single  
8 instruction to take over responsibility and Gran required  
9 multiple instruction. That just -- that's just not there, and  
10 that's just a mischaracterization that we believe Google is  
11 asserting here.

12 And this is the -- you know, the majority of the argument  
13 here. It goes through some teachings of Gran at the top. And  
14 then, again, these teachings confirm that Gran never takes over  
15 responsibility, not about whether it's one instruction or  
16 multiple instructions.

17 And, Your Honor, what I think is telling here is Google's  
18 argument is kind of based on this false premise that Gran  
19 discloses multiple instructions for taking over playback  
20 responsibility and that, again, Sonos distinguished those  
21 multiple instructions based on the claims requiring a single.  
22 And that, again, is just not the case.

23 And if you look at what Sonos -- how Sonos described Gran  
24 and if you were to read that reference and the portion cited in  
25 the response here, you'll see that the continuous instructions

1 in Gran direct the media-rendering device of Gran to continue  
2 playing subsequent files in the device queue that the  
3 media-rendering device itself is already playing.

4 So there's nothing disclosed here in Sonos' response that  
5 would tell you Gran -- in Gran that the control point, which is  
6 the controller here, that that is playing audio from the queue  
7 and then these instructions are causing the media-rendering  
8 device, which is the playback device, to take over  
9 responsibility. That's just not there.

10 I mean, there's nothing to take over. All this discloses  
11 here is that the controller manages the queue, not that it's  
12 playing the queue, and that it directs the media-rendering  
13 device to continue playing that queue. Keep playing the next  
14 song. You're already playing the queue, play the next song and  
15 the next song and so forth.

16 So, you know, one last thing, Your Honor, I'd just like to  
17 point out. And, you know, this is about, you know, Google's  
18 lead case which you heard about, the in re Varma case. You  
19 know, the claim language is a lot different from, for example,  
20 the Convolve case and the claims that are at issue here.

21 In Varma the term at issue was "a statistical analysis  
22 request corresponding to two or more selected investments."  
23 Obviously the claims here don't have that corresponding  
24 language. You may have seen Google tried to cut  
25 "corresponding" out and (inaudible) some language from the '033

1 patent claims. But at the end of the day the '033 patent  
2 claims do not use this term "corresponding."

3 In this Varma case the Federal Circuit obviously construed  
4 this term to mean "a single request that must correspond to at  
5 least two investments." But, again, it did so in part based on  
6 the claims which we believe the language is significantly  
7 different here. But also the prosecution history was very  
8 clear there. The patentee had amended the claims to include  
9 this limitation, and then distinguish the art based on the fact  
10 that the claims required a single analysis request  
11 corresponding to multiple selected investments.

12 So, Your Honor, I'll stop there unless you have questions.  
13 I can pass it back to Mr. Jaffe.

14 THE COURT: No. I'll hear from defendant.

15 MR. JAFFE: Thank you. If we can get our slides back up.

16 And if we can go back TO Slide 52, please.

17 So the first issue that I want to address is to really  
18 clarify what Google is asking for and what it's not asking for  
19 here. Google is not asking where we have claim language that  
20 says "an instruction." There can be more than one instruction.  
21 We are not trying to override the "an instruction" that is  
22 listed there. That's not what we're doing. And that's, again,  
23 expressly parallel to what we're talking about in the Varma  
24 case.

25 What we are arguing is that Sonos cannot negate what is

1 required by the language following it. Again, expressly  
2 parallel to what we were talking about in the Varma decision  
3 here.

4 If we can go to Slide 51, please.

5 So mapping this to the claim language where, in the yellow  
6 here which is Claim 1 of the '033, it says "an instruction."  
7 We're not saying there can't be lots of instructions. What we  
8 are saying is that Sonos cannot override the language that  
9 follows the instruction and describes what the instruction is.  
10 That they cannot override that language, that the language  
11 itself says there must be an instruction for the at least one  
12 given playback device -- excuse me -- to take over  
13 responsibility, and then further where it says "wherein the  
14 instruction configures the at least one given playback device  
15 to."

16 Now, counsel for Sonos was suggesting that these three  
17 substeps were capabilities of the playback device. But I think  
18 just reading the plain language, we can see this is a further  
19 limitation on the instruction it expressly says -- and this is  
20 in between the two red blocks here in Claim 1 of the '033 on my  
21 slide -- "wherein the instruction configures the at least one  
22 given playback device."

23 So, again, we are not asking for anything other than what  
24 the claim language itself provides. While Sonos, on the other  
25 hand, is asking to override the claim language and make it so

1 that they can read out the requirements on what the  
2 instructions are here. And we think that that's improper under  
3 the Federal Circuit cases that we've cited to.

4 Counsel for Sonos mentioned the Convolve decision as on  
5 point. I think if Your Honor looks at that decision, you'll  
6 see that there are actually two findings in that decision. One  
7 is the Court finds that "a processor" not limited, and that's  
8 what counsel for Sonos mentioned.

9 But if you actually read on in the decision, they -- the  
10 Federal Circuit in that case looked at a different set of  
11 claims, and they found that it was limited.

12 And if you look at the difference between the two  
13 language -- the claim language in those two cases or -- excuse  
14 me -- those two claims within the same case, you can see that  
15 in our situation the '033 patent is actually parallel to the  
16 situation in Convolve, where the Federal Circuit did find it  
17 was limited to a single processor.

18 And I'm just going to read from the relevant part of the  
19 Convolve decision, which is 812 F.3d 1313. And it says: Given  
20 this claim language, which contrasts with the claims described  
21 above that allow for multiple processors, we conclude that  
22 Claims 1, 3 and 5 require the user interface to work with a  
23 single processor in performing all the claimed steps.

24 And so here we have the same situation, where the claim  
25 language does not allow for multiple instructions that perform

1 these steps. It expressly requires that there -- the  
2 instruction configures the three substeps and that same  
3 instruction takes over responsibility.

4 So even under the decision that they're kind of  
5 championing now, this Convoke decision, it supports Google's  
6 position that they cannot read out the express requirements of  
7 the instruction by using the kind of modifier "an" at the  
8 beginning.

9 And then on the last item, counsel went through the  
10 prosecution history in some detail. I think, you know, I went  
11 through that before, basically that they aren't addressing the  
12 specific parts of the file history that I quoted. They're only  
13 quoting the end part and not the specific parts I quoted above.

14 But unless Your Honor has any additional questions, that's  
15 it for me.

16 THE COURT: I don't.

17 Any response?

18 MR. SMITH: Yeah, Your Honor. Just two points.

19 On the most recent point Mr. Jaffe just raised about Sonos  
20 not addressing the prosecution history he pointed to, I think  
21 that's incorrect. We -- again, I can direct you to the slide  
22 if you'd like, but we expressly address the language where  
23 Sonos talked about the continuous instructions in Gran. So I  
24 think that was a mischaracterization.

25 Second, you know, he pointed you to some other portion of

1 Convolves that he says is more on point. I would encourage you  
2 to look at that. You'll see that the claims and the issue that  
3 I addressed with the Court, those are the ones that are most  
4 analogous to the claim at issue here, and there were other  
5 reasons why the Court limited the different claims in the way  
6 that they did.

7 That's all I have, Your Honor.

8 THE COURT: I'll be back in a few seconds.

9 (Pause in proceedings.)

10 THE COURT: If we can go back on the record.

11 The Court is going to maintain its construction of plain  
12 and ordinary meaning.

13 I'll ask -- anyone can answer this: Have we set a trial  
14 date for this case?

15 MR. SIEGMUND: Yes, Your Honor. I believe we have. I'm  
16 looking right now at the scheduling order.

17 Your Honor, it's June 6th.

18 THE COURT: Very good. Okay. Is there anything else we  
19 need to take up?

20 MR. SIEGMUND: Nothing from plaintiff, Your Honor.

21 THE COURT: Very good. I've got two more -- I have two  
22 more Markmans today. I doubt they'll be of this stellar  
23 quality, but this was a great way to start the morning. Maybe  
24 I'll figure out how to do these, you know, by the end of the  
25 year.

1           So I very much appreciate the quality of the lawyers  
2 today, and I look forward to having you in trial next June.  
3 Hopefully I'll see some of you soon. Take care.

4           (Hearing adjourned at 12:06 p.m.)  
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1 UNITED STATES DISTRICT COURT )  
2 WESTERN DISTRICT OF TEXAS )  
3

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